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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 15, 1963.

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POINT I—The settlement that plaintiff and Inger arranged without D & K's knowledge or participation and consummated without D & K's consent on summation morning did not alter the structure of the case insofar as D & K was concerned. All of the elements which would have had to be established in order to impose ultimate liability upon D & K when the case commenced remained intact. Since, at the outset of the case D & K placed in issue the question of Inger's liability to plaintiff, Inger would first have had to be held liable to the plaintiff before the second phase of the case, the claim over, came into play. The settlement did not do away with the necessity of establishing liability as a prerequisite to the claim over. By settling as it did, Inger could not change the issues; it assumed the burden of proving that it was initially liable to plaintiff as a basis for its indemnity claim; and since both triers of the fact determined that Inger was not so liable to plaintiff, D & K was entitled to judgment dismissing the amended third-party complaint upon the basis of the jury's verdict at the first trial and upon the Court's findings at the second.

The rule of law enunciated by the Court of Appeals that Inger did not have to establish to the satisfaction of the trier of the facts that it was actually initially liable runs contrary to the ex-

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press provisions of Rule 14(a) F. R. C. P. and is repugnant to the Fifth and Seventh Constitutional Amendments in that it deprives D & K of its due process rights to a trial of the issues raised by the pleadings and the benefit of the jury's determination that the facts were such as to exonerate D & K from liability on the issues as they were properly constituted 24

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No. .....

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner* prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed on March 1, 1963 insofar as it reversed a final judgment entered in the United States District Court for the Eastern District of New York on May 21, 1962 which dismissed Inger's amended third-party complaint for indemnity against D & K after a re-trial before the Court without a jury, and insofar as it affirmed an intermediate order entered on July 18, 1957, which denied D & K's motion for judgment dismissing said amended third-party complaint upon the basis of a special verdict of the jury rendered at the first trial of the action.

* Petitioner Daniels & Kennedy, Inc., a stevedoring contractor, will hereinafter be called D & K, and respondent A/S Inger, a shipowner, will be called Inger.

Opinions Below

The first District Court's opinion by Bruchhausen, J. (App. pp. 92-103), is reported at 153 F. Supp. 600.

The Second District Court's opinion by Abruzzo, J. (App. pp. 73-91), is unreported.

The Court of Appeals' opinion (App. pp. 65-72) is reported at 314 F. 2d 395.

Jurisdiction

The judgment of the Court of Appeals was entered on March 1, 1963. A timely filed petition for rehearing and rehearing *in banc* was denied on March 28, 1963.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. A. § 1254 (1).

Questions Presented for Review

The essential question here is whether the rule of law enunciated below is invalid because it deprives a third-party defendant of its Fifth Amendment due process and Seventh Amendment jury trial rights by depriving it of use of its full rights under Rule 14(a) F. R. C. P.

I

Where a shipowner settles a longshoreman's personal injury suit immediately before the case is to be submitted to the jury on the main claim and the claim over without the approval, consent or participation of the longshoreman's employer, who as a third-party defendant impleaded by the shipowner, has put in issue both the question of the shipowner's liability to the longshoreman and its liability over to the shipowner in the event the shipowner were held liable,

(A) is it the rule of law that as to the employer the issues remain unaltered and that, in order for the shipowner to recover indemnity, it must be determined by the trier of the facts that (1) the shipowner is actually liable to the longshoreman, and (2) if so liable, that the employer's breach of warranty of workmanlike services led to the shipowner being held so liable and that the shipowner's conduct was not of such character as to preclude recovery; and (3) the settlement amount was reasonable in relation to actual damages recoverable for the injuries plaintiff sustained;

or

(B) is it the rule of law that the settlement transforms the issues and the shipowner must recover the amount of the settlement plus its defense expenses from the employer if (1) there was a potentiality of liability because a question of fact existed as to whether the shipowner was liable to plaintiff; (2) the injuries are sufficiently severe, so that by an indiscriminate homogenization of liability evidence and such injury evidence, the settlement even though "plainly erroneous as to liability" is termed "reasonable as to amount"; and (3) the cause of the accident is the sole negligence of the injured longshoreman himself in his careless use of adequate equipment?

Involved in the question thus broadly stated are the following.

(1) Where a shipowner is in fact not liable to an injured longshoreman for injuries he sustained, does the longshoreman's employer have to indemnify the shipowner for monies the shipowner, without the employer's consent, voluntarily pays in settlement of the longshoreman's claim?

(2) Can a shipowner by settling an action at the conclusion of the evidence turn the issues in the case up side down so that the very factual determinations (that it was

not liable to plaintiff and that plaintiff's sole negligence in the careless use of proper equipment was the accident cause) which absolve it from initial liability and consequently require a dismissal of its indemnity claim, serve the diametrically opposed purpose by becoming a basis for awarding indemnity because the stevedoring contractor was the plaintiff's employer?

(3) Does a third-party defendant impleaded under Rule 14(a) F. R. C. P. actually have full rights to question and have determined both plaintiff's claim against defendant and the claim over, or do such rights exist only if their existence suits the purposes of the one who impleads it?

(4) Does the third-party defendant, who answers both the main and third-party complaints, on its own have a due process right to have the trier of the facts make a determination of the foundational issue of whether the defendant is actually liable to the plaintiff which is a prerequisite element of the claim over, regardless of any agreement plaintiff and defendant ~~may make between themselves~~ without the third-party defendant's advice, approval or consent?

(5) Are the employer's Fifth Amendment due process rights to a trial and determination of the issues violated by the rule of law fashioned below which empowers a shipowner, by settling, to take away from the employer its Rule 14(a) right to have the question of initial liability determined and to furthermore so completely alter the issues that indemnity is awarded if plaintiff's negligence is the sole cause of his own accident, with the result that the very factual determinations which exonerate the employer from liability render it liable instead?

(6) Did the Seventh Amendment entitle the employer to judgment upon a jury verdict which determined that the shipowner was not liable to plaintiff on any theory and

that the private settlement the shipowner made with plaintiff was furthermore plainly erroneous as to its liability to plaintiff under all of the testimony in the case?

(7) Are third-party defendants-employers as much entitled to Fifth Amendment due process rights to a complete trial and determination of all issues raised, and Seventh Amendment rights to the results of jury determinations of those issues as are other litigants such as plaintiffs-longshoremen and defendants-third-party plaintiffs-shipowners.

(8) Does the due process clause of the Fifth Amendment guarantee a third-party defendant the right to a trial and determination of such issues as would have exonerated it from liability when the trial commences and does the Seventh Amendment guarantee its rights to a judgment in its favor when the jury determined such issues in a manner which frees it from liability, or do the plaintiff and defendant-third-party plaintiff by privately settling between themselves when the entire action is about to be summed-up to the jury have the power to so alter the issues and reduce the third-party defendant's rights that the very determinations which excuse third-party defendant from liability instead transform into a basis for imposing liability upon the third-party defendant.

(9) Was the attorney who represented the employer throughout the trial required to undertake the representation of the shipowner instead of the employer in order to preserve the employer's already existing rights under Rule 14(a) F.R. C. P. to have the jury determine the question of the shipowner's liability to the plaintiff, and to be exonerated from liability by the jury's verdict that the shipowner was not liable?

(10) Where under the actual facts determined by the triers of the facts the remedy of an injured longshoreman

falls classically and solely within the purview of Sections 4 and 5 of the Longshoremans and Harbor Workers' Compensation Act (33 U. S. C. §§ 904, 905) because his accident was caused solely by his own negligence; is the meaning of *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, to be stretched to the point where the longshoreman's employer must respond in indemnity to a shipowner merely because the shipowner was sued by the injured workman, the shipowner asserted a claim over against the employer, and the shipowner thereafter voluntarily settled the longshoreman's claim against it, without the employer's consent.

II

May an indemnity claim against an employer be predicated upon the negligence of the injured plaintiff, its employee?

(1) Where it is factually determined that the sole cause of an accident is the careless operational negligent act of an injured longshoreman, for which a shipowner is not liable to him, may an indemnity claim against the longshoreman's employer validly rest upon the *respondeat superior* founded theory that such negligence constituted a breach of the employer's warranty where a breach of this type rather than leading to shipowner liability leads in the opposite direction of exculpating the shipowner from liability.

(2) Does a breach of an employer's warranty of a type which does not lead to a shipowner's liability, but leads rather in the opposite direction of exonerating the shipowner from liability, or limiting the shipowner's liability, support a shipowner's indemnity claim against the employer.

Statement of the Case

Plaintiff, Damanti, a longshoreman hatch-boss, employed by D & K, sued Inger, a shipowner, claiming that Inger's negligence and its vessel's unseaworthiness with respect to

a beam jack Inger supplied for his use in moving hatch cover beams, caused him to be injured (1a-42).*

Availing itself of Rule 14(a) F. R. C. P., Inger impleaded D & K,** claiming that its Inger, was not negligent and its vessel not unseaworthy, but, if unseaworthiness there was, it was occasioned by D & K's fault, and demanding judgment over against D & K for any sums that may be adjudged in favor of plaintiff, Damanti, against it, together with costs and attorney's fees in defending against plaintiff's action (10a-13a).

Exercising its rights under Rule 14(a) F. R. C. P., D & K answered both plaintiff's complaint against Inger and Inger's amended third party complaint against it, putting in issue the material allegations in, and requesting dismissal of, both complaints (5a-7a, 14a-16a).

On May 13, 1957, the case in all its aspects came to trial before Judge Bruchhausen, and a jury. On May 22, 1957, the evidence was completed, and the Court ordered summations for the following morning. Throughout the trial, D & K's counsel represented D & K under its rights as a party adverse to both plaintiff and Inger under Rule 14(a) F. R. C. P. and, he, by definition, was identified solely with his client in the eyes of the jury.

From the time suit was commenced against it until May 23, 1957, when counsel were to sum up to the jury on the issues in both the main and third-party actions, Inger kept to itself complete and exclusive control over the conduct of its defenses, and it at no time tendered control of

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* Numerals in parentheses refer to D & K's appendix below and numerals in brackets refer to Inger's appendix below.

** Inger also impleaded the vessel's time charterer, Illinois Atlantic Corp., which throughout the case took a position identical to that which D & K takes here. Inger did not appeal from the dismissal of its third party complaint against Illinois, and, therefore, for practical purposes the charterer exited from the case at that point.

its defense to D & K or requested D & K to come in and defend it. In fact, as is obvious, completely controlling its own defense, it asserted a third-party complaint against D & K.

Very briefly condensed, the evidence at the trial was the following:

Plaintiff, the longshoreman hatch-boss in charge of unloading No. 1 hatch, testified that a beam jack, a piece of portable equipment which Inger supplied for his use in moving hatch beams, was defective, and while he was using it he was caused to be injured [21a, 27a-28a]. Certain of his subordinates also testified that the beam jack was defective [41a, 48a, 51a]. Plaintiff said he was told to use beam jacks in moving beams by a ship's officer. None of his D & K's superiors had given him orders to use them [100a-101a], and it was stipulated that D & K did not inspect the beam jack [44a] (121a). Operations first began on October 27, 1955 [96a, 35a] at 8 A.M. and beam jacks were used for 5 minutes to open up at the main deck level [119a-120a, 222a]. Their next use was when plaintiff met with his accident while using one to open up at the 'tween deck level at 4 P.M. [16a-17a]. The testimony of plaintiff and his witnesses as to the condition of the beam jack and the manner of its use by plaintiff, and the contradictions in such testimony would in and of itself easily enable the trier of the facts to reject plaintiff's claim and determine that the beam jack was not defective but that the sole cause of plaintiff's accident was his negligence in carelessly using it [47a, 86a, 92a-98a, 102a-103a, 117a, 120a, 125a-127a, 131a, 134a-135a; 139a-141a, 144a-145a], [21a-22a].

There was, however, strong additional evidence.

Preliminarily, testimony by Inger's carpenter and two of its officers placed it beyond dispute that Inger undertook to supply beam jacks for longshoremen's use and

to inspect, test and repair them beforehand; that it was Inger's and its officers' and crew's obligation; not D & K's, to see to it that the beam jacks were safe and fit for use when Inger's crew laid them out for the longshoremen (145a-149a, 174a-196a, 199a-202a, 212a-213a, 219a-227a); and that Inger further undertook to check the ship's equipment while unloading work was in progress to see to it that it was safe and to remove any unsafe equipment (166a-167a, 209a, 222a-223a).

Inger's carpenter who had the specific responsibility for their upkeep stated that it was his duty to make a detailed inspection of the jacks and to repair or remove from service any jack which was not perfect or had the slightest thing wrong with it (175a-176a, 182a, 185a-195a, 199a-205a, 219a, 224a-227a), [52a]. He testified to making a detailed and meticulous inspection of the beam jack's parts before he laid it out for use by longshoremen and that the beam jack was in perfect condition on the morning of October 27 (185a-205a, 232a).

Additionally, two ship officers testified that they visually inspected and manually manipulated the beam jack's parts shortly after the accident, and again tested the beam jack in operation by moving beams with it the very next day and that it not only looked to be in perfect condition but performed perfectly when tested (150a-153a, 168a-163a, 170a-171a, 214a-216a). Their testimony was corroborated by an Inger-employed investigator and the log (206a-207a, 223a-224a).

These officers impounded the beam jack immediately after the accident. It remained in the exclusive possession of Inger, its representatives or attorneys from that day forward (108a, 111a, 151a, 160a-161a, 163a-165a, 172a-173a, 215a-219a). During the trial, Inger produced a beam jack in Court which its officer testified was the beam jack in question (Ex. F, 216a-217a, 165a); it was in perfect working order.

It is thus apparent that the veracity of the two groups of witnesses collided head-on-head and in turn, produced a sharply defined question of fact as to whether plaintiff's accident was caused solely by reason of his own negligence in the careless use of the beam jack or whether it was caused by a defect in the beam jack.

If the jury were to find that it was caused solely by plaintiff's negligence or for that matter, even if under a different evidentiary picture, that it was caused by his employer's or fellow employees' negligence in careless use of equipment, the verdict would have had to be for Inger and against plaintiff (*Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752; *Rawson* v. *Calmar SS. Co.*, 304 F. 2d 202; *Williams* v. *SS Richard De Larinaga*, 287 F. 2d 732; *Billeci* v. *United States*, 298 F. 2d 703; *Fox* v. *The S. S. Mormacwind*, 285 F. 2d 222; *Morrell* v. *United States*, 297 F. 2d 662; *Oblatore* v. *United States*, 289 F. 2d 400; *Massa* v. *C. A. Venezuelan Navagacion*, 209 F. Supp. 404; *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65), the amended third-party complaint would have to be dismissed as academic (See e.g. *West* v. *United States*, 361 U. S. 118, marginal note 1 at p. 119; *Howe* v. *Arrow Transportation Co.*, 280 F. 2d 403), and plaintiff would be left with his remedy under the Longshoremans and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.*). (*Morales* v. *City of Galveston*, 370 U. S. 165, marginal note 1 at p. 166; *Lyons* v. *Empresa Hondyrena*, 273 F. 2d 317, 319; *Puddu* v. *Royal Netherlands Steamship Co.*, *supra.*)

If, on the other hand, the jury were to find the jack defective and Inger negligent, and/or its vessel unseaworthy (*Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325), it would award recovery to plaintiff against Inger for the amount of his damages as mitigated by his contributory negligence, if any, and it would then proceed to determine the factual questions of whether a breach

by D & K of its warranty of workmanlike services led to Inger's liability, and if so, whether the conduct of Inger was of such nature as to prevent indemnity recovery (*Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563; *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32, cert. den. 369 U. S. 848). And, there would also arise the sharp question of law as to whether, as the Court subsequently charged at Inger's request, D & K could be charged with an indemnity or even contribution liability under the *respondeat superior* doctrine based upon a breach of warranty deriving solely from plaintiff's negligence, even though Inger would have already recovered for such negligence by having the damages plaintiff recovered against it mitigated.*

With the case in this posture, on summation morning, May 23, 1957, D & K's counsel was summoned into the Court's chambers where Inger's counsel confronted him with a carefully prepared statement to the effect that Inger had privately agreed to settle with plaintiff, and if D & K did not consent to and pay it according to their arrangement, D & K's counsel, as attorney for Inger's "Indemnitor" should step into his shoes and continue with Inger's defense as Inger's counsel from that time forward [53a]. It was an ultimatum, which, at the least, dictated that D & K either waive its personal Rule 14(a) rights to have the question as to whether Inger was initially liable to plaintiff determined (a waiver of D & K's first line of defense) or that D & K assume absolute liability for the settlement they arranged and at the very least for any judgment plaintiff might obtain against Inger (a waiver of D & K's second line of defense).

* See Point II, pages 57-62, *infra*

Giving the ultimatum the broader interpretation which Inger's counsel gave it later, it was a so-called option for D & K to either consent to the settlement and litigate whether Inger was entitled to indemnity solely upon the issue of whether D & K was in some way chargeable with negligence, or in the alternative, if D & K would not consent for its counsel to abandon his defense of D & K and undertake to represent Inger instead, so as to insure that, if Inger were held liable, the same jury would automatically grant recovery over against D & K (60a, 62a).*

No matter what the interpretation, Inger obviously sought to maneuver D & K into the position of abandoning one or the other of its defenses. Inger's counsel was advised that D & K would not consent to the settlement and Inger was warned that, if it nevertheless chose to settle, D & K would still insist that the defenses against liability which it held up to then would not be abandoned, i.e., in order for D & K to ultimately be held liable, it would still have to be established by a determination of the Court and jury exercising their alloted functions that under the law and facts Inger was actually liable to plaintiff, and if so Inger was nevertheless entitled to indemnity, and that the settlement was reasonable (228a-230a); [54a-55a]; for, insofar as D & K was concerned, regardless of whether it was plaintiff who had the burden of proving Inger's initial liability as a pre-requisite to indemnity over, or whether Inger voluntarily undertook to carry that burden for plaintiff; D & K's rights could not be altered. Despite this warning, Inger formally stipulated to a settlement with plaintiff [57a], apparently for the reason that

* The ludicrousness of this so-called option is made apparent by Inger's counsel's answers to inquiries while he was on the stand of the second trial. Even he could not conjure up any interpretation of that offer which would not involve an abandonment by D & K of a right nor could he explain how an orderly trial could have been had if D & K had been foolish enough to abandon its position and step into the trap that was laid (59a-63a, 70a-77a).

it had already privately consummated the settlement but withheld stipulating formally because it wanted to attempt to inveigle or intimidate D & K into abandoning its rights first (59a-60a).

The Court then informed the jury of the settlement and permitted Inger's counsel to testify, over D & K's objection, as to the motivations he claimed induced Inger to settle. Reciting to the jury which itself had heard and seen all the evidence, views of the evidence, of the law, of what the jury could, would and should find, his words were so weighted as to convince the jury that it should find Inger liable to plaintiff, but that such findings should be consonant with Inger's then indemnity theory that it was entitled to indemnity over if it were held liable on unseaworthiness as contrasted to negligence. When taking the stand and in his testimony, he separately categorized the injury and liability questions and related the reasonableness of the $30,000 settlement amount only to plaintiff's injuries (57a-61a), (231a), (54a-55a).

Cross-examination elicited that both he and plaintiff's counsel had been negotiating settlement throughout the case, but that D & K or its counsel had never been informed of, invited to participate or had participated in such negotiation, and that the first time D & K's counsel was apprised of the settlement was by that morning's ultimatum (232a). This was again brought out when he was cross-examined while on the stand at the second trial (56a-59a), and additionally it was shown (56a-77a) that he and plaintiff's counsel had obtained their client's approval to the settlement before the time it was announced to D & K and that they had planned between themselves the tactics they would use upon D & K when they thought the moment opportune to announce their agreement (58a-62a, 64a-66a). He also finally, grudgingly, admitted that a claim over falls if the main claim is not sustained (80a, 233a-234a).

The case then went to the jury for a special verdict upon a charge which stated, at Inger's specific request and excepted to by D & K, that the only D & K's negligence claimed was that of plaintiff himself (247a, 250a-251a).

The interrogatories submitted to the jury for a special verdict and their answers thereto are as follows:

"(A)—Settlement With Plaintiff

1. Was the payment of the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes.

2. If no, was the payment plainly erroneous? (not answered).

3. If yes, was it plainly erroneous as to amount? No. As to liability? Yes.

4. Is it possible that you would have found the shipowner liable? For negligence? No. For unseaworthiness? No.

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered). For negligence? For unseaworthiness?

(B)—Indemnity Claim

1. Were the agents, servants or employees of the stevedoring contractor negligent or careless in any way? Yes.

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes.

3. If yes, what was the nature of such negligence? Carelessness.

4. (a) Was the ship or its equipment unseaworthy at 8:00 o'clock a.m. on October 27, 1955? No.

(b) Was the ship or its equipment unseaworthy at the time of the accident? No.

5. Was the shipowner negligent? No.

6. If yes, what did that negligence consist of? (not answered)."

Read in harmony with one another, with the Court's charge, with the evidence, and even with the opinion testimony of Inger's counsel, the jury's answers demonstrated that it found that the sum of $30,000 was reasonable compensation for plaintiff's injuries if Inger were liable to him ((A)1, (A), 3), but that the beam jack was not defective and therefore Inger was not liable to plaintiff for negligence or unseaworthiness ((B) 4a & b, (B) 5, (A), 4); that plaintiff's injuries were caused solely by reason of his own carelessness in his use of the non-defective jack ((B) 1, (B) 2, (B) 3); and that upon all the evidence it heard in its dual capacity as jury and witness, it was not possible that it would have found Inger liable to plaintiff for either negligence or unseaworthiness ((A) 4); and furthermore on the liability issues, as contrasted to the injury issues, Inger's settlement with plaintiff was plainly erroneous under all of the testimony in the case ((A) 1, (A) 3).

With the rendition of the verdict, D & K in open Court moved for judgment dismissing the amended complaint upon the basis that the findings that Inger was not initially liable to plaintiff upon any theory required such dismissal and for protective purpose moved to set aside findings ((B) 1-(B) 3 (258a-260a)), and Inger moved to set aside parts of the verdict and for a directed verdict (258a-260a). Inger subsequently moved on papers to set aside parts of the verdict and for the Court to substitute instead findings

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* See *Gallick v. Baltimore & Ohio R. Co.*, 372 U. S. 108 at p. 119 and pp. 121-122.

of its own for those of the jury, and for the consequent direction of a verdict for Inger upon the findings so altered. Alternatively, Inger sought a new trial only with respect to those parts of the verdict which it disliked (264a-272a).

The sole complaint that the verdict was a product of jury confusion came from Inger who made it then (266a-267a) and at the appellate level. D & K sought to uphold the verdict at both levels.* Over D & K's opposition (281a-284a), and also that of Illinois (273a-280a), Judge Bruchhausen in an opinion (285a-293a) granted Inger's motion to the extent that a new trial was ordered on all of the issues in the case and denied D & K's motion for judgment upon the verdict (65a-66a). D & K's attempted appeal from the order was dismissed because the order was not final.

By stipulation, the re-trial was without a jury. Re-trial before Judge Abruzzo was at Inger's urging upon a stipulation that the full transcript of the first trial be received in evidence and that the Court make a determination of all issues on the basis of the transcript, along with portions of the deposition of Milton Brown (83a). At the re-trial, counsel for Inger again testified "live" as to "reasonableness" over D & K's objection (48a-55a). Inger did not offer any additional evidence (83a).

Thereafter, in an opinion (82a-100a) which reviewed both groups of witnesses' testimony (86a-91a), Judge Abruzzo, making independent findings of fact, determined that the facts were virtually the same as the jury had found them to be. He found that the beam jack was not defective (91a, 92a), the vessel not unseaworthy (92a), Inger not negligent (92a) and the sole cause of the ac-

* In the Court of Appeals D & K argued (D & K's brief Point IV, pp. 42-46) along the lines subsequently stated in *Gallick, supra*, that there was a duty on the part of the District Court and the Court of Appeals to harmonize interrogatories and that proper harmonization mandated judgment for D & K on the verdict.

cident was plaintiff, Damanti's, negligence in the manner of use in the jack [90a, 92a]. He further found after listening to Inger's counsel's live testimony on "reasonableness" that Inger's settling was not acting within the limits of reason [92a, 98a].* Judge Abruzzo also found that the settlement between Inger and plaintiff was made without D & K's advice or consent and that D & K was not informed of, did not participate in, and was not invited to participate in the settlement conferences between Inger and plaintiff [98a-99a]; and he further commented upon the impossibility of D & K's counsel acceding to Inger's ultimatum and preserving D & K's rights intact at the same time [98a]. He concluded that the amended third-party complaint be dismissed against D & K [100a].

Inger thereafter appealed to the Court of Appeals from that part of the judgment [101a-104a] entered upon Judge Abruzzo's opinion which dismissed its amended third-party complaint against D & K, and solely from that part of Judge Bruchhausen's intermediate order which denied its motion for a directed verdict [103a-104]. D & K cross-appealed (295a-296a) from those parts of Judge Bruchhausen's order which (1) denied D & K's motion for judgment in its favor upon the basis of the jury's special verdict and (2) set aside the special verdict and ordered a new trial.

The Court of Appeals reversed the judgment, and granted judgment in favor of Inger for the amount of the settlement upon the jury verdict at the first trial, and also, in effect, stated Inger was entitled to judgment at the second trial and that Judge Abruzzo's finding that the settlement was not reasonable was clearly erroneous, and

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* This last finding was set aside by the Court of Appeals as clearly erroneous even though the Court heard a live witness on this question. (Cf. *Guzman v. Pichirilo*, 369 U. S. 698.) The other findings were not challenged by the Court of Appeals.

remanded the case to the District Court to fix defense expense recovery.

The Court of Appeals' opinion (App. 65-72), reciting parts of the testimony relating to plaintiff's injuries so as to show their claimed severity, and reciting only that liability *evidence* favorable to plaintiff's case, and then treating *evidence* and *facts* as synonymous, but entirely omitting mention of the *evidence* adduced to show that the beamjack was in perfect condition which ripened into *fact* by the fact trier's determinations, in effect held that Inger was entitled to indemnity as a matter of law because plaintiff's sole negligence in causing his own accident constituted a breach by D & K of its warranty of workmanlike services and consequently that Inger was required to establish additionally only that there was something called a "potential liability" on the part of Inger, the term "potential liability" apparently being defined as some evidence of liability on Inger's part which if accepted by the jury would have made Inger liable; and a reasonable settlement meaning a lumping together of evidence on liability and evidence on damages so that if the damages are severe but the liability evidence is not accepted by the trier of the facts,* a settlement becomes reasonable if it is for some sum a claims adjuster or plaintiff's attorney might view as a reasonable settlement.

The Court of Appeals' opinion has in effect held that if a plaintiff merely makes out a case sufficient to go to a jury, and his injuries are severe, then a settlement between him and the shipowner for what is relatively a lesser amount than he would have been entitled to recover if the shipowner were in fact liable to him, would entitle the shipowner to pursue an indemnity claim successfully by show-

* Here both triers of the facts not only found that Inger was not liable, and that they could not possibly have found it liable, they found that from the liability standpoint the settlement was more than unreasonable, it was plainly erroneous.

ing merely that plaintiff himself was the sole cause of his own accident.

In the process, the Court of Appeals has, by dint of ignoring their existence, stripped D & K of the rights it has under the Fifth and Seventh Constitutional Amendments and Rule 14(a) F. R. C. P., and, even on the claimed over question, it has ignored the principle that to support an indemnity claim, an employer's breach of warranty must be one which leads to shipowner liability rather than in the opposite direction of shipowner non-liability.

The rule of law so announced stems from dictum in a single case (*Chicago, Rock Island & Pac. Railway Co.* v. *U. S.*, 220 F. 2d 939), which is based upon facts and principles irrelevant here, and the offspring which *Chicago, Rock Island & Pac. Railway Co.* sired which are also distinguishable. No other case or authority is cited as supporting the rule of law laid down by the Court which directly conflicts with prior precedents in the same circuit and with the other cases and authorities which have considered the question.

Reasons for Granting the Writ*

This is not a run-of-the-mill shipowner-employer indemnity quarrel, nor an oddity which will seldom recur.

Rather, the precise problem is whether an impleaded employer has in its own name independent rights which the shipowner cannot vitiate at will, or whether an employer is so vassal to a shipowner that the shipowner has the vested power to completely invert the issues in the midst of trial, divest the employer of its then-existing rights, and impose liability upon the employer even though

* Since copies of D & K's petition for rehearing below are being filed with this petition pursuant to Supreme Court Rule 21(4), effort will be made not to duplicate what was said therein.

the facts as determined by two triers of the facts exonerate the employer from such liability.

This petition asks this Court to settle, upon a rule of law which will govern the future pattern of procedure in this type of case, and in fact, all cases where the impleader rule, Rule 14(a) F. R. C. P., is invoked.

Calling for definition, and for that matter preservation and protection, are the Fifth and Seventh Constitutional Amendment and the Rule 14(a) F. R. C. P. personal rights of an impleaded third-party employer who has answered both the main and third-party complaints to have both claims determined by the jury where the shipowner at the eleventh trial hour suddenly and unilaterally settles with plaintiff.

Recently, the Court of Appeals held that shipowner and plaintiff have the power to so mold the issues that, if the shipowner is held liable to plaintiff, an indemnity award against the employer automatically follows (*Capato v. U. S. Lines Co.* (2 Cir.), 311 F. 2d 413). By the holding here it takes a great step beyond. It empowers them to control the result so as to impose indemnity liability upon the employer regardless of what the actual facts are. By the simple device of settling between themselves they are given the power to eliminate the *if*, and upon doing so, the license to reach into the employer's pocket for the amount of their privately agreed to settlement plus the shipowner's defense expenses. Here that has been done even though the actual facts, as determined by two triers of the facts, disclose that the shipowner was not in fact liable to plaintiff and, consequently, there was no liability over, and that the breach of warranty being charged against the employer (plaintiff's sole operational negligence) could not lead to the shipowner's liability.

Sub silento, the opinion below translates Rule 14(a) into a trick rule which empowers a third-party plaintiff

to implead a third-party defendant, and then, at will, take away from it the very constitutional rights, i.e., the right to have in its own name defenses to, and determinations of, both the main and third-party claims, which the Rule by explicit language promises to safeguard. All the more strangely, it bestows upon a third-party plaintiff the authority to exercise this right-destroying power in, of all places, a courtroom during the waning trial moments. Seemingly, the Court has blocked out its inborn basic instincts for due process (cf. *Hoeg* v. *Elliott*, 167 U. S. 401, 17 S. Ct. 841, 843-845).

This Court has never before passed upon the validity of the rule of law enunciated below, and, as is readily perceivable, it is one which reduces a third-party defendant's rights to a parody of such rights, and completely revises Rule 14(a) procedures in this highly litigation-active area of the maritime law.

Of what value to the employer are its rights under Rule 14(a) to try its own name question both plaintiff's claim against the shipowner which is a necessary antecedent to liability over, and also the shipowner's claim over, if the shipowner has the power to wipe out or abridge them by taking away the right to go to and be exonerated by a verdict on either of them? (*Hoeg* v. *Elliott*, *supra*.)

Additionally, the new rule of law proclaimed below is in diametric opposition to the authorities,* which have directly considered the question, including prior precedent emanating out of the Second Circuit itself. It is based solely upon an erroneous interpretation of a single case and cites for added support only that case's offspring which are also clearly distinguishable.**

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* Since these authorities stem from many jurisdictions, they have been quoted at length with usually any comment at pages 48-50 *infra*.

** Analyses of these cases appear at pages 33-38 *infra*.

Whether the new rule of law adopted below meets with constitutional and common sense tests is a vital point of concern here. Trying it against these principles demonstrates that it inflicts upon the employer the very wrongs (the deprivation of due process) which it is the Court's function to prevent (*Hovey v. Elliott, supra*). It is a rule which, for the first time in the history of our jurisprudence, allows two parties by the use of a self-interested Munich-like agreement, made during trial, to divest a third party of its due process and jury trial rights to a determination of the issues; to rewrite a Federal Rule of Civil Procedure (Rule 14(a) F. R. C. P.) and furthermore to so transform the issues that the very determinations which absolve the third party of liability convert into a basis for its liability. Not squaring with the fundamental law—due process—it is wrong.

This petition is lengthy for the reason that no question of law since that considered in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co.*, 350 U. S. 424, has an equivalent far-reaching effect upon both this area of the maritime law, and impleader practice under Rule 14(a).

Bluntly stated, if the rule laid down below is to be the law the following result:

(1) Rule 14(a) F. R. C. P. is judicially amended by including a proviso which empowers a third-party plaintiff to excise from it the provisions purposely built into it for the protection of a third-party defendant's personal constitutional and fundamental law due process and jury trial rights.

(2) Indemnity claims are now a gimmick for foisting upon an employer a liability which it did not even have before Sections 4 and 5 of the Longshoremen and Harbor Workers' Compensation Act (33 U.S.C. §§ 904, 905) made any promises to it; for even before receiving that Act's promises against liability it would not have been directly liable to plaintiff, whose negligent act was the sole cause of his own injury.

(3) The very indemnity principles which this Court laid down in its prior opinions are abrogated, for an indemnity claim against an employer no longer needs to be predicated upon a theory that an employer's substandard performance of its operations led to the shipowner's being held liable and subjected it to damages, since it can now be premised upon a theory that the charged breach is one which leads to a shipowner's non-liability.

These things are self-evident, for, here, the Court of Appeals by holding the employer liable for the amount of a settlement the shipowner effectuated without the employer's participation or consent, and the shipowner's unconcluded defense defense expenses to boot, has in substance declared that a shipowner has the power to turn a case topsy-turvy on summation morning so that the very fact triers' determinations which exonerate the employer from liability (the shipowner non-liability to plaintiff, and plaintiff's negligent operational act as the sole cause of his injury which does not lead to shipowner liability) became instead the basis for saddling the employer with liability.

Having driven employers to the wall by its molding of the substantive law, the Court of Appeals has apparently come to the point of taking away an employer's procedural rights, basic due process, the Fifth and Seventh Amendments and Rule 14(a) notwithstanding, so that shipowners may be assured of recoveries over even when fact triers exonerate employers from liability by their findings.

The Court of Appeals has here gone beyond the point of making an employer a shipowner's insurer. It has so subordinated the employer to the shipowner's will as to make the employer's courtroom rights depend for their existence solely upon whether the shipowner wishes them to exist or not.

The taking of D & K's rights and property without due process and giving them to Inger is more plainly evident here than it was in *Hoeper v. Elliott*, 167 U. S. 409 (see also,

Societe Internationale v. Rogers, 357 U. S. 197), for here D & K was not guilty of contempt, default, or anything of that nature. All D & K did was to insist upon the very rights Rule 14(a) F. R. C. P. gave it—its personal rights to go to the jury on both the main and third-party claims in its own name.

POINT I

The settlement that plaintiff and Inger arranged without D & K's knowledge or participation and consummated without D & K's consent on summation morning did not alter the structure of the case insofar as D & K was concerned. All of the elements which would have had to be established in order to impose ultimate liability upon D & K when the case commenced remained intact. Since, at the outset of the case D & K placed in issue the question of Inger's liability to plaintiff, Inger would first have had to be held liable to the plaintiff before the second phase of the case, the claim over, came into play. The settlement did not do away with the necessity of establishing initial liability as a prerequisite to the claim over. By settling as it did, Inger could not change the issues; it assumed the burden of proving that it was initially liable to plaintiff as a basis for its indemnity claim; and since both triers of the fact determined that Inger was not so liable to plaintiff, D & K was entitled to judgment dismissing the amended third-party complaint upon the basis of the jury's verdict at the first trial and upon the Court's findings at the second.

The rule of law enunciated by the Court of Appeals that Inger did not have to establish to the satisfaction of the trier of the facts that it was actually initially liable runs contrary to the express provisions of Rule 14(a) F. R. C. P. and is repugnant to the Fifth and Seventh Constitutional Amendments in that it deprives D & K of its due process rights to a trial and determi-

nation of the issues raised by the pleadings and the benefit of the jury's determination that the facts were such as to exonerate D & K from liability on the issues as they were properly constituted.

As relevant, Rule 14(a) F. R. C. P. provides:

> "WHEN DEFENDANT MAY BRING IN THIRD PARTY. * * * a defendant may * * * serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. * * * the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff * * *. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. * * *"

Because Inger claimed that D & K was liable over to it if it were held liable to plaintiff, Rule 14(a) permitted Inger to implead D & K so as to simultaneously serve two Inger purposes. First, by giving D & K the right to in its own name contest plaintiff's claim against Inger and to have it fully determined, if there were a fact trier's finding that Inger was liable to plaintiff, D & K would also be bound by it, and Inger would not have to prove all over again in a separate action that it was so liable (*Staten Island Rapid T. Ry. Co.* v. *Phoenix Indemnity Co.*, 281 U. S. 98, 108; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784; *Man. Serv. R. E. Co.* v. *D. B. & M. Holding Corp.*, 257 N. Y. 423; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 359; *Knell* v. *Feltman*, 174 F. 2d 662, 664-665; *U. S. Wire & Cable Corp.* v. *Ascher Corp.*, 34 N. J. 421,

167 A. 2d 633; *Keljikian* v. *Star Brewing Co.*, 303 Mass. 53, 54; *Buhl* v. *Viera*, 328 Mass. 201). Second, by at the same time giving D & K the right to contest the claim over, if Inger was found to be initially liable, the same fact trier would go on to decide whether there was liability over, or not. In this way, a multiplicity of actions would be avoided, Inger would minimize its litigation expenses, and there would be a consistency of results because in one trial a single fact trier will have heard and decided all of the issues (*Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, *supra*).

For Rule 14(a) F. R. C. P. to achieve these ends in a manner compatible with due process concepts, D & K had to be given, and was given, complete, independent, personal and irrevocable rights of its own to in its own name contest to final determination all of the issues (*Hovey* v. *Elliott*, 167 U. S. 409) involved in an indemnity claim which are: first, the question of Inger's liability to plaintiff, absent which there will be no basis for the claim over; and second, the question of liability over if Inger were held liable to plaintiff (*Staten Island Rapid T. Ry. Co.* v. *Phoenix Indemnity Co.*, *supra*).*

> "No adjudication can be made that a third party is liable upon a cause of action for indemnification without opportunity afforded to the third party to contest the cause of action asserted against it in regard to every element that enters into that cause of action (*Phoenix Indemnity Co.* v. *Staten Island R. T. Ry. Co.*, 251 N. Y. 127; aff'd, 281 U. S. 98, 108)." *Liberty Mutual Ins. Co.* v. *Colon & Co.*, 260 N. Y. 305, 309.

Thus, what Inger did or failed to do, desired or did not desire to do, with regard to plaintiff's claim against it, and whether or not plaintiff remained in the case or Inger

* D & K protected these rights by answering both plaintiff's complaint against Inger and Inger's third-party complaint.

removed him from it, could not prevent D & K from retaining its independent right to have the question of Inger's liability to plaintiff resolved by the jury. When Inger removed plaintiff from the case, it could not remove with him D & K's right to question whether Inger was in fact liable to him, for it would not square with due process to allow Inger to bind D & K by anything short of a verdict on the initial liability question upon which the claim over depends (3 Moore 2d ¶ 14.13 pp. 433-434, ¶ 14.27 [2] p. 502; *Min. Serv. R. E. Co. v. D. B. & M. Holding Corp., supra; Knell v. Feltman, supra; American Export Lines v. Reed*, 262 F. 2d 122, 125; *Nashville Bridge Company v. A. B. Burton Company*, 299 F. 2d 257, 259).

For example, 3 Moore 2d ¶ 14.13 states at pages 433-434:

> "Rule 14(a) still provides that 'The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim.' This sentence, the Advisory Committee stated, 'protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action.' The Preliminary Draft of 1936 gave only a restricted right; it provided that with leave of Court the third-party defendant may assert any defenses of the third-party plaintiff to the plaintiff's claim which the third-party plaintiff is, to the prejudice of the third-party defendant, neglecting to assert. But the Rule as promulgated and as it now stands is preferable, since if it did not give an absolute right to present defense to the plaintiff's claim it might be a violation of due process to make the adjudication binding on the third-party defendant."

As was stated concisely in *Knell v. Feltman*, 174 F. 2d 662 at 664-665:

> "Knell was under the compulsion of that part of Rule 14(a) which is that one so situated 'shall make

his defenses to the third-party plaintiff's claim as provided in Rule 12 * * *." Moreover, Knell could have asserted, under the Rule, any defenses which Feltman had to the Langlands' claim.

* * *

"Knell was bound * * * by the adjudication of Feltman's liability to the Langlands, as under the Rule he had the right to assert against the Langlands any defenses which Feltman had."

The settlement adjudicating nothing and binding no one had to leave D & K's defense to plaintiff's claim against Inger intact. When the jury and the second trial judge adjudicated that Inger was not liable to plaintiff, dismissal of the third-party complaint was mandatory.

Plainly, since either the absence of initial liability by Inger or the absence of liability over if there were initial liability would result in absolving D & K from liability, Rule 14(a) secured to D & K the full personal due process right to have both issues determined by the fact trier regardless of the course Inger chose to pursue for its own self-interests.

Inger was free to go in any direction it pleased, but it could not compel D & K to follow behind or order D & K to go in a direction of Inger's selection. While Inger could not be prevented from entering into a private agreement with plaintiff, that agreement could no more bind D & K or affect its position,* than could some agreement D & K might make with plaintiff or Inger affect the one who was not a consenting party to it. (Cf. *Paliadin v. Lowenbach 88 Co.*, 301 F. 2d 403; *Czaplicki v. The Hough Silvercloud*, 351 U.S. 525.) Fairness, the heart of due process demands that a third-party defendant's rights be given respect equal to that accorded other litigants.

* See the statement by D & K's counsel to Inger's counsel upon being confronted by settlement ultimatum on summation morning (228a-229a).

A third-party plaintiff can range the entire spectrum from offering no defense to plaintiff's claim, to settling, to taking no appeal when one is warranted; and to even conceding liability to plaintiff, but, the point is simply that it cannot thereby bind another, a third-party defendant, or detract one iota from the third-party defendant's right to have both the initial liability and the claim over questions determined (see, e.g., *Paragon Oil Co.* v. *Republic Tinkers, S. A.*, 310 F. 2d 169; *Zucchelli* v. *City Constr. Co.*, 4 N. Y. 2d 52; *Frankel* v. *Berman* (N. Y.), 10 A. D. 2d 838, modg. 19 Misc. 2d 1074; *Gambella* v. *Johnson & Sons, Inc.* (N. Y.), 285 App. Div. 580).

In short, while Inger and plaintiff were free to serve their own ends in settling, they could not by that means deprive the non-participating D & K of its right to exoneration from liability when both fact triers' determinations that Inger was not liable to plaintiff initially took away the foundation upon which the claim over was conditioned. (*Staten Island Rapid T. Ry. Co.* v. *Phoenix Indemnity Co.*, 281 U. S. 98, 108.)

The rule of law espoused below crystallizes into the view that, if it did not serve Inger's purposes for D & K to retain its right to have the initial liability question determined by the jury, it lay within Inger's power to divest D & K of that right. This pronouncement is fundamentally wrong, for it is hostile to Rule 14(a) and repugnant to the basic due process rights of a third-party defendant which the Rule protects. Contrary to the opinion's view, a third-party defendant is not a second class litigant who has no rights but mere conditional privileges which are revocable at the will of the one who impleads it.

True, it lay solely within Inger's power to implead or not to implead D & K, but it is equally true that, once D & K was impleaded, Inger's powers over D & K ended. D & K acquired rights of its own to contest and have determined both whether Inger was liable, and, if so, whether

there was liability over. Inger could not consistent with due process qualify either right because D & K's exercise of both of them did not suit Inger's purposes any more than D & K could deprive Inger of its rights to both defend against plaintiff's claim and prosecute its claim over. Inger's self-interested desire that D & K's rights be narrowed by compelling it to choose between questioning plaintiff's claim or Inger's third-party claim could not destroy D & K's rights to question both claims, to have them both determined, and to be excused from liability by the fact triers' findings that Inger was not liable to plaintiff.

Self-evidently, D & K's insistence upon its own right to have both claims resolved by the jury could not serve as a lever for prying either right away from it. The insistence upon a constitutional right can never serve the reverse purpose of being interpreted as the waiver or forfeiture of such right; and, D & K's counsel was not compelled to indulge in a shoe-exchanging exhibition before the jury, and thereby abandon or weaken one D & K right, in order to preserve the other.

D & K's position on its rights is exemplified in *American Export Lines* v. *Revel*, 262 F. 2d 122, at page 126:

> "The judgment entered in favor of Export (defendant-third-party plaintiff) against the United States as third-party defendant was based on Revel's (plaintiff's) judgment against Export. The net effect of these two judgments was to place the loss on the United States. If on appeal, Revel should fail to hold his recovery against Export, this would automatically relieve the United States from liability. True, on appeal, the United States might escape liability, even if Export failed to upset Revel's award; but the United States was interested in both avenues of escape."

D & K's position has constantly and consistently accorded with these principles. It maintained, and maintains

that the settlement did not change the structure of the case so as to put it in either a more or less advantageous position than it occupied prior to the settlement.*

Status quo of the issues was all D & K insisted upon. Due process entitled it to that.

Giving D & K due process mandated that, before it could be held liable, it was necessary that all of the elements which would have had to be established absent the settlement still had to be established, and that, consequently, Inger, by settling and removing plaintiff from the case, assumed plaintiff's burden of proving that it was liable to him just as he had to establish such liability before the settlement. As to D & K, it made no difference which party preceding it in the caption of the case had to carry that burden; but one of them had to carry it before D & K could ultimately be held liable. Since both fact triers determined that the burden was not sustained, no liability should have been imposed upon D & K.

If Rule 14(a) means what it says, and the Fifth and Seventh Constitutional Amendments protect third-party defendants as well as other litigants, D & K's insistence upon its right to have the jury determine whether Inger was in fact liable to plaintiff remained in the case despite the settlement and Inger's pressures upon D & K to waive that right (*Hoeg* v. *Elliott*, 167 U. S. 409; *Société Internationale, Etc.* v. *Rogers*, 357 U. S. 197); and both fact triers' findings as to Inger's non-liability mandated that the third-party complaint be dismissed.

The holding below which empowers Inger to do away with the necessity that it first be found actually liable

* Indeed, if the Court of Appeals were correct in its holding that Inger, by settling, deprived D & K of the ability to retain its Rule 14(a) rights fully intact, Inger's settlement would estop it from further pursuit of its indemnity claim. (*American Surety Co* v. *Ballman*, 115 F. 292.)

as a prerequisite element of the indemnity claim; and then empowers Inger to turn the case topsy-turvy so that the very factual determinations which would exonerate D & K from liability serve instead the opposite purpose of imposing a liability upon D & K, plainly deprives D & K of fundamental law and Fifth Amendment due process, and of that same right as it is incorporated in Rule 14(a).

Merging with the due process deprivation is a divestiture of D & K's right to the benefit of the jury's determination of the issues, for the opinion disregards the jury's findings that the facts were such that they mandated a dismissal of the indemnity claim because its first requisite element, Inger's initial liability, was lacking. In this fashion, the opinion tramples upon D & K's Seventh Amendment rights also. (*See Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd., supra; Gallick* v. *Baltimore & Ohio Co., supra; Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co., supra; Simler* v. *Conner*, 372 U. S. 221.)

Here, Inger was purely and simply a volunteer in settling with plaintiff. It was not liable to him and for that matter neither was D & K, for the latter's sole liability to plaintiff was under the Longshoremens Act.* Both Inger and D & K exercised their own free choices, Inger by settling without D & K's consent, and D & K by standing fast and insisting that the issues be determined by the jury. Because the advantage Inger thought it would gain over D & K in the eyes of the jury by settling when and how it did, did not materialize, is no reason for turning the issues upside down so that the factual determinations which absolve D & K of liability serve the opposite purpose of licensing Inger to reach into D & K's pocket for

* D & K upon first hearing Inger's surprise settlement announcement ultimatum immediately made clear its insistence upon retaining its personal rights to have the jury determine both claims, and it at that time cautioned Inger that if it settled it would have to assume plaintiff's burden of establishing its initial liability to him in fact and law as a requisite element of its continuing indemnity claim. (228a-229a) [53a-55a]

reimbursement. By allowing that very thing to be done, the opinion below patently deprives D & K of its rights and property without due process. It is therefore obviously wrong. It appears that the Court of Appeals has here demonstrated that its view of the shipowner-employer relationship is equivalent to that of lord and whipping boy, for it paradoxically makes Inger's ill-advised unilateral settlement operate in such fashion as to strip D & K of its rights and to give Inger a basis for indemnity recovery which it did not have before.

Analyses of the cases cited by the Court of Appeals.

At the outset, it must be noted that in none of the cases relied upon below was there a settlement during trial of an action in which the putative indemnitor was impleaded, and it answered both the complaint and third-party complaint, and the settlement was at a point when the case was shortly to go to the jury on the issues on both claims.

In seeking to support its strange result the opinion below relies exclusively upon *Chicago, Rock Island & Pac. Ry. Co. v. United States* (7 Cir.), 220 F. 2d 939, and cases which follow and are based solely upon it (see, *Hankinson v. Penn. RR. Co.* (3 Cir.), 282 F. 2d 249; *California Stevedore & B. Co. v. Pan-Atlantic SS Co.* (9 Cir.), 291 F. 2d 252; *Lillsberg v. Pacific Far East Lines, Inc.* (N. D. Cal.), 167 F. Supp. 3). No other authorities are relied upon. All other relevant authorities are ignored.

The opinion below, by direct quotation of it, primarily premises itself upon a hyperbolic bit of errant dictum in *Chicago, Rock Island*, which, if read literally, displays a cynical attitude toward a jury's capacity to hear and decide a FELA personal injury case, and, moreover, a contemptuous view of the judicial process' ability to cope with such cases.* In any event, this is not a FELA case.

* *Tugboat Indian v. A. S. Iravani Redfr.*, 344 Pa. 15, 5 A. 2d 153, quoted at pages 44-49, *infra*, discloses the complete fallacy of dictum statement.

and moreover the dictum statement has no relevance here, where on the very day of the settlement, the jury, the most impartial witness to the evidence, demonstrated by verdict that it was not sheer folly to have resisted settlement to the point of verdict.*

Additionally, assuming *arguendo*, that Inger's indemnity claim against D & K was as airtight as the opinion indicates, Inger had nothing to fear from a plaintiff's verdict for it could without any travail automatically pass the verdict over to D & K which unlike the putative indemnitor in the cited case was, as a third-party defendant, in the case, in the courtroom, and before the jury on the issues in the third-party action also. In fact, if here there were automatic liability over, it all the more demonstrates the need to protect D & K's rights to a jury determination as to whether Inger was in fact liable to the plaintiff, for if that premise were correct, permitting Inger to remove the initial liability issue from the case was tantamount to empowering Inger to impose liability upon D & K at will.

Before returning to *Chicago, Rock Island* and its progeny it must be pointed out, that the other cases the Court cites at page 1283 of the slip decision (*Waterman SS Corp.* v. *Dugan & McNamara*, 364 U. S. 421; *Shannon* v. *United States*, 235 F. 2d 457; *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753, cert. den. 352 U. S. 926) in no way support the rule of law enunciated. They stand only for the proposition that a settling party who claims indemnity from another is not precluded from pursuing that claim because it settles. In each one of these cases, while there was a settlement there was unequivocal determination that the shipowner was in fact in

* Reference to the record evidence reviewed in Judge Abruzzo's opinion (App. 75-84) demonstrates that the Court of Appeals in its efforts to bolster its result took a completely one-sided view of the evidence (App. 72) and made such evidence synonymous with "known facts" (App. 71). The facts—i.e., that which both triers of the facts found—were completely to the contrary.

tially liable to plaintiff; and in each case, the Court carefully pointed out that there was in fact such initial liability on the part of the settling shipowner. In fact, in some of them, the Court took special pains to point out that the shipowner was not a volunteer because it was in fact actually liable. (See also, *Pennsylvania RR Co. v. McAllister Bros.* (S.D.N.Y.), 137 F. Supp. 788, aff'd. (2 Cir.) 240 F. 2d 423; *Acc. Tractor & Equipment, Co. v. Olympic Steamship Co.* (9 Cir.), 227 F. 2d 274.)

This is graphically demonstrated by this Court's opinion in *Waterman SS Corp. v. Dugan & McNamara* where it was specifically stated that the indemnity-seeking shipowner pleaded and proved that the vessel was in fact unseaworthy.

The opinion in the mutual fault collision contribution case of *Weyerhaeuser SS Corp. v. United States*, 372 U. S. 597, also makes this clear. There, when this Court used the term "reasonable settlement" it plainly accorded the term its every day meaning. Reasonableness was related only to the damages suffered by the injured person, and was not related to or confused with the liability question.* Moreover, it is apparent that, if, in that case, Weyerhaeuser were found not to have been at fault and the United States or the injured were solely to blame Weyerhaeuser would have been a volunteer in settling, and this Court would not have permitted it to obtain contribution, let alone indemnity, from the United States whose liability to the injured was exclusively under the FELA.

Returning to the distinctions between *Chicago, Rock Island*, and the case at bar. Firstly, there it was specifically indicated (at 220 F. 2d 939) that Chicago, Rock Island was secondarily legally liable to the injured under the FELA by virtue of its status as his employer for passive

* See also *Hooks v. Sears, Roebuck* 140 App. Div. 450; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698.

negligence while the primarily liable party was the United States, whose employee's active negligence in throwing a postal pouch from one of the employer's passing trains injured the employee who was inspecting its wheels as it passed and who was himself completely free of any negligence. Consequently, the secondarily liable railroad employer was entitled to be reimbursed by the primarily liable United States for the amount paid by the railroad in settling of its employee's FELA claim.* Chicago, Rock Island's analysis of its own authorities (See e.g. *Gulf Mobile & Ohio Railroad Co.* v. *Arthur Dickson Transfer Co.*, 343 Ill. App. 148, 98 N. E. 2d 783) plainly demonstrates that indemnity was allowed because the railroad, FELA employer, was in fact actually legally liable secondarily for passive negligence.

More deeply probed, *Chicago, Rock Island* appears to rest upon subrogation principles whereby the employer railroad which paid its injured employee only for lost wages and for medical expenses incurred was placed in the employee's shoes and subrogated to his rights against the United States to the extent of such payments. Here, subrogation by Inger to plaintiff's rights against D & K would not avail it any. Firstly, plaintiff's rights against D & K are exclusively under the Longshoremen's Act, and, secondly, since plaintiff's own negligence was the cause of his accident, he could not have recovered from D & K even under the law as it existed before the Longshoremen's Act promised D & K freedom from it.

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* As to a railroad's actual initial FELA liability to its employees in such a situation see e.g. *Sinkler* v. *Missouri Pacific R. R.*, 356 U. S. 326; *Ellis* v. *Thompson*, 332 U. S. 450; *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396; *Carney* v. *Pittsburgh & Lake Erie R. R. Co.*, 13 Cir. 3, 27 963, ——— F. 2d ——— and cases cited therein. But as to a shipowner's non liability where a longshoreman is injured by reason of his own fellow employees or the employer's improper use of proper equipment see e.g. cases collected at page 10, *supra*.

As to *California S & B, supra*, it appears that, there, the claim for indemnity was under the express terms of a written indemnity contract, a situation not existing here, and more important, the stevedoring contractor-employer participated in the settlement and at least impliedly consented to its consummation, thus apparently waiving or being estopped from raising any issue as to the initial liability question. This factual situation is diametrically opposed to that here where D. & K. upon finally being advised about the settlement protested against it and desired a jury determination.

In *Hankinson, supra*, the United States, the indemnitor, not only fully participated in the settlement and consented to its consummation, it also expressly stipulated that the railroad indemnitee was in fact initially liable to the person injured, but later attempted to renege upon its stipulation.

In *Lillebera*, the same factual pattern is evident. A settlement, apparently fully acquiesced in by the employer was thereafter approved by the Court and embodied in a pre-trial order. Additionally the Trial Court found that the shipowner was in fact liable because the vessel was in fact unseaworthy as the result of conditions created by the employer.

Significantly, in none of the cases relied upon below were the settlements made during a trial in which the claimed indemnitor was participating as an impleaded party whose status was fixed in the eyes of the jury. Most certainly, in none of them was the settlement made without the employer's approval at the time the entire case was to go to the jury for verdict.

Having thus inquired into the principles which must serve as the mold for shaping the appropriate rule of law, and having analyzed the authorities relied upon below, we turn to the many authorities which state the rule of law advocated here. They agree with D & K's position through-

out—i.e., Inger's surprise summation morning settlement and maneuvers did not preclude Inger from pursuing its indemnity claim, but in order to prevail on that claim, Inger had the burden of proving that: (1) it was actually liable to plaintiff under the law and facts; (2) if so liable, it was entitled to indemnity from D & K because the latter's breach of warranty led to its being held so liable and it was not itself guilty of such conduct as to preclude indemnity and (3) the amount of the settlement was reasonable in that plaintiff's injuries would have warranted a recovery for the amount of the settlement if there had been liability; and that since both triers of the facts determined that Inger was not liable to plaintiff, it failed to sustain its burden of proof on the first element of its claim and the amended third-party complaint had to be dismissed.

Quotations from the authorities which state the rule of law applicable:

The requisite elements in an indemnity suit are tersely set out in 42 C.J.S. Indemnity § 25 at pages 603-604:

> "*Necessity of compulsory payment.* In order that one seeking indemnity be entitled to recover, he must have sustained an actual legal liability to the injured party; and he cannot recover over an amount which has been wrongfully recovered from him. Thus, while a person who is liable for injuries caused by the negligence or wrongful act of another may adjust and pay the claim therefor and need not wait the result of a suit in order to be entitled to indemnity from the wrongdoer, the amount claimed must be reasonable and just, and the payment must have been made in good faith, after notice to the indemnitor; and a person so paying assumes the risk, in an action against the wrongdoer for indemnity, of being able to prove the actionable facts on which his liability depends as well as the reasonableness of the amount which he pays."

As to the evidence and burden of proof in an action for indemnity, 42 C.J.S. Indemnity § 25a states at page 626:

> "Thus the burden of proof is on indemnitee to prove clearly all the material elements of his cause of action against the indemnitor, including, inter alia, breach of the indemnity contract, the responsibility over of the indemnitor to him, the fact and amount of loss sustained, the facts on which his legal liability to pay the claim existed, as well as the reasonableness of the amount paid, and where judgment has been rendered against the indemnitee in an action which his indemnitor lacked notice, the burden rests on the indemnitee when suing the indemnitor again to establish all of the actionable facts."

There is no question but that before this case the rule of law in the Second Circuit was that advocated by D & K.

In *The Toledo*, 122 F. 2d 255, cert. den. 314 U. S. 689, it was stated at page 257:

> "The theory of the charterer on this claim is that in transshipping the cargo it was mitigating the damages which the cargo owner would have against it; thereby reducing the claim it would have over in indemnity against the respondent. A claim for indemnity, however, requires that an actual liability be sustained by the indemnitee, and if he settles a claim without a determination of the rights in question, he bears the risk of proving an actual liability in the action over for indemnity. *Donald v. Gen.* D.C., E.D. Va., 127 F. 228; *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 219, 218, 67 N. E. 439; *Colonial Motor Coach Corp. v. New York Central R. R.*, 131 Misc. 891, 901, 228 N. Y. S. 508. In failing to establish a lack of due diligence the charterer failed to establish a right to indemnity based on an actual liability on its part. The court below was clearly correct in denying this claim.

for damages on the ground that the charterer acted as a volunteer."

In *Pennsylvania Railroad Co.* v. *McAllister Brothers*, 137 F. Supp. 788 (S.D.N.Y.), affd. as a "reasoned opinion", 240 F. 2d 423, 424, where Pennsylvania sought indemnity for monies paid to a longshoreman, one Ceci, in settlement of his action against Pennsylvania, Judge Weinfeld stated at page 791:

> "Thus these are the issues to be determined: (1) was Pennsylvania liable to Ceci upon the law and the facts as adduced in the state court action; (2) if so, is Pennsylvania entitled to recover from McAllister as indemnity the amount it paid to Ceci in settlement of its liability; (3) is the dismissal of the state court action as against McAllister, a co-defendant res judicata so as to bar recovery; (4) does the fact that Pennsylvania settled Ceci's claim against it rather than to await a determination by a jury or a Court constitute it a volunteer so as to preclude recovery."

And again at page 795,

> "4. The Defense of Voluntary Payment
>
> The final defense vigorously asserted upon the trial is that Pennsylvania may not recover the sum paid in settlement of Ceci's claim because it was not made under the compulsion of a judgment or with McAllister's consent. It is true that the settlement does not bind the claimed indemnitor nor establish its liability; but equally true it is that the person making the voluntary payment is not deprived of his right to seek enforcement of his claim of indemnity for the amount so paid. All it means is that the indemnitee has assumed the risk of proving that (1) it was liable to the third-party; and (2) the reasonableness of the

settlement. With respect to the first item, I have already found that Ceci fully established his case against Pennsylvania—as to the second, the respondent has conceded that if in fact Pennsylvania were liable the amount paid was reasonable."

In *McAndrews v. United States Lines*, 1959 A.M.C. 1577 (S.D.N.Y. 1958), the Court said:

(1577) "It was duly stipulated herein by Chelsea that the sum of $60,000 was a reasonable settlement to be paid to the plaintiff in the event of liability, and that the sum of $2,250 was a reasonable fee for the attorneys for United States Lines, and that the sum of $1,105.71, payable as disbursement by the attorneys for the said United States Lines, was a reasonable amount. This stipulation, however, was without the concession of any liability or obligation on the part of the defendant United States Lines, to make the said payment to the plaintiff or of liability of Chelsea therefor.

"I find that said sums were reasonable."

"19. United States Lines has not shown by a fair preponderance of the credible evidence that it was liable in any respect, by reason of negligence or unseaworthiness, to the plaintiff Joseph McAndrews, or that the condition of the dunnage on the 'tween deck adjacent to the lip of the coaming or the existence of any cable in the same area was a proximate cause of the plaintiff's injuries."

Then the Court went on to say:

(1579) "A longshoreman may sue a third party tort feasor for his injuries. *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 1947 A.M.C. 349, 1016, and if the facts permit, he may recover from the ship owner for unseaworthiness or for negligence, or both. *Pope*,

of Talbot, Inc. v. Hawn, 346 U. S. 406 (1953), 1954 A.M.C. 1; *see also Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 1956 A.M.C. 9. In such an action, the ship-owner is placed in the position of having to defend itself against the claim of negligence or unseaworthiness. However, if the ship-owner settles its action with the longshoreman and seeks indemnity over from others, it must in effect establish its own negligence or the unseaworthiness of its vessel as a prerequisite to a recovery over on its indemnity claim.

Therefore, since in the case at bar United States Lines voluntarily settled with the plaintiff Joseph McAndrews, it must establish as a prerequisite to recovery against Chelsea the actionable facts showing the liability of United States Lines to plaintiff. *The Toledo* (2 Cir.), 1941 A.M.C. 1219, 122 F. (2d) 255; *Pennsylvania Railroad v. McAllister Brothers Inc.* (S.D.N.Y.), 1956 A.M.C. 707, 137 F. Supp. 788, affirmed (2 Cir.) 1957 A.M.C. 318, 240 F. (2d) 423; *Ryan v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 218 (1903). This burden has not been sustained by United States Lines as third-party plaintiff against Chelsea."

See also, *West Africa Navigation Ltd. v. Nacirema Operating Co.* (E. D. Pa.), 191 F. Supp. 131.

New York law is identical. In *Ryan v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, the Court said at page 218:

> "The contract of indemnity implied by law, in favor of one who is legally liable, for the negligence of another, covers loss or damage, and not mere liability. (Sedgwick on Damages, Sec. 785; *Oceanic S. N. Co. v. Compania T. E.*, 134 N. Y. 461; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550.) On the other hand, such loss or damage may be voluntarily paid by the innocent party who is legally liable without wait-

ing for judgment (Thompson on Negligence, p. 789; *Gray v. Boston Gas Light Co.* 114 Mass. 149, cited with approval in *Oceanic S. N. Co. v. Compania T. E.*, 134 N. Y. 461), but, in that event, he undoubtedly assumes the risk of being able to prove the actionable facts upon which his liability depends as well as the reasonableness of the amount which he pays."

And in *Colonial Motor Coach Corp. v. N.Y.C. R.R. Co.*, 131 Misc. 891, 228 N.Y.S. 508, the Court said:

"(131 Misc. 903) It has, however, been finally determined, and the rule in the State of New York is, that a person entitled to indemnity, where he is liable to be mulcted in damages, may settle the claims and recover over against the indemnitor, subject to the proof (1) of liability and (2) as to the reasonableness of the amount of settlement."

(902) "This wisdom of the rule as established in this State is obvious. The courts favor settlements of negligence actions. By settlements the perils and expense of litigations are avoided, and the burden upon courts already overburdened is relieved by every settlement. No harm can possibly arise to a defendant liable over by reason of such a settlement, because the plaintiff in making the settlement without the consent of his indemnitor defendant is still under the obligation of proving (1) that he was liable, (2) that the settlement was reasonable, and (3) that his liability was of such a character that in spite of it he may recover over against the defendant."

In accord are *Employers Mutual Liab. Ins. Co. v. De Cesare & Monaco*, 9 A D 2d 370; *White v. Maryland Casualty Co.*, 139 App. Div. 179; *Woods & Son v. Webb*, 130 App. Div. 450; *Weber v. City of New York*, 13 A D 2d 823; *Zuchelli v. City Consol. Co.* 4 A D 2d 52, aff'd 286 App. Div. 842; *Gambella v. John A. Johnson & Son, Inc.* 285 App. Div. 580; *Frankel v. Herman*, 10 A D 2d 838.

revg. 19 M. 2d 1074; *Glenn* v. *George Rosen & Son, Inc.*, 12 A D 2d 799.

The law in other jurisdictions is also the same.

Tugboat Indian Co. v. *A/S Ivarans Rederi*, 344 Pa. 15, 5 A. 2d 153, states at 5 A. 2d 154-156:

"Barnes * * * (sustained) severe injuries.

Barnes brought an action in tort for damages * * * against Tugboat Indian Company as the alleged owner and operator of the tugboat * * * Tugboat Indian Company also asked for a nonsuit but the motion was refused. Being apprehensive as to the amount of damages which the jury might award against it, Tugboat Indian Company thereupon settled with Barnes by paying him $2,500, taking from him a release and an assignment of his rights against the S. S. 'Tercero', its owners, underwriters and charterers.

Upon the commencement of the action by Barnes, counsel for Tugboat Indian Company wrote letters to A/S Ivarans Rederi and Moore & McCormack, Inc., demanding that they undertake the defense of the suit, and again wrote to their counsel prior to effecting the settlement with Barnes, giving notice of the proposed payment and expressly reserving right of action by way of subrogation. Tugboat Indian Company then began the present suit in assumpsit against A/S Ivarans Rederi, * * * and Moore & McCormack Co., Inc., to recover the sum of $2,500 paid to Barnes, together with expenses of $1,290.30 incurred in connection with the defense of the Barnes suit. A verdict was rendered by the Jury in favor of plaintiff in the amount of $2,500, the item of expenses having been eliminated by the trial judge. Subsequently the court granted a motion for judgment n. o. v. Plaintiff now appeals for a restoration of the verdict.

[1-4] This is not a suit by one tortfeasor against another for contribution. Neither is it an action based

upon Barnes' assignment of his claim, plaintiff evidently realizing that unliquidated damages in tort cannot be assigned. Patten v. Wilson, 34 Pa. 299; Marsh v. Western New York & Pennsylvania Ry. Co., 204 Pa. 229, 231, 53 A. 1001; Sensenig v. Pennsylvania R. Co., 229 Pa. 168, 78 A. 91; Manganiello v. Lewis, 122 Pa. Super. 435, 186 A. 218. Plaintiff framed its case upon the established doctrine that one who pays under coercion or duress the obligation of another is entitled to restitution from the real debtor. In its statement of claim it alleged that the injuries to Barnes were occasioned solely by reason of the negligence of defendants in the way in which they handled the spring line, and were not caused or contributed to by any fault on the part of plaintiff. The statement of claim further alleged that plaintiff settled with Barnes because 'fearful of the result of continuing the litigation under the circumstances and realizing the possible burden upon its property and business of an adverse verdict and the costs involved in continued litigation and appeal.' Aside from other questions which suggest themselves, it is clear that the facts disclose no coercion within the meaning of the principle upon which plaintiff relies. In order to constitute duress there must be an actual or threatened seizure of a person or his property for the purpose of compelling him to pay money for which he is not liable. Christ Church Hospital v. Philadelphia County, 24 Pa. 229, 231; Lehigh Coal & Navigation Co. v. Brown, 100 Pa. 338, 340; Peebles v. City of Pittsburgh, 401 Pa. 304, 308, 47 Am. Rep. 714; Harvey v. Girard National Bank, 119 Pa. 212, 222, 13 A. 202; De la Cuesta v. Insurance Co. v. North America, 136 Pa. 62, 78, 79, 658, 20 A. 505, 9 L.R.A. 671; Payne v. School District, 168 Pa. 386, 392, 31 A. 1072; Schoenfeld v. City of Bradford, 16 Pa. Super. 165, 169; Carhill Petroleum Co. v. Ennis-Bayard Petroleum Co., 81 Pa. Super. 486; Friedline v. Somerset Borough, 114 Pa. Super. 49, 52, 173 A. 424.

[5, 6] Plaintiff was in no such perilous position. Had it persisted in its defense in the Barnes suit, that it was in no way responsible for the accident, and had the jury rendered a verdict in its favor, it would thus have exonerated itself without the necessity of any payment or further action on its part; on the other hand, had a verdict and judgment been rendered against it, this would have established that it was in fact negligent and was therefore not entitled to the relief which it claims on the ground that defendants alone were at fault. Plaintiff did not, however, choose to abide the issue of the Barnes trial, but settled because it entertained the fear that a just verdict might not be reached, although it would have had the complete protection of judicial review, both by the trial court and on appeal, of any verdict rendered. It is significant that in the present action the jury returned a verdict in plaintiff's favor on the ground that it was not negligent; why should it have been supposed that the jury in the Barnes suit would not have come to the same conclusion? It is true that plaintiff was called upon to decide whether to take the chance of a possibly unfavorable verdict or to settle the claim, but this is a situation inherent in all jury trials, and the necessity of a litigant's exercise of judgment to determine the better policy to pursue is not duress within the meaning of the law. It cannot be said that one is coerced when he has ample opportunity to have his rights litigated and can utilize all the processes of the law to protect himself against an unwarranted demand. If, instead of availing himself of such protection, he chooses to compromise the claim, a payment thus made is not compulsory and does not entitle him to a right of recovery over by way of subrogation or indemnity.

[7] The Pennsylvania cases are unanimous in denying restitution to a person who, contending that an

other has no valid claim against him, nevertheless makes payment solely because of the threat or the institution of litigation to enforce the demand. 'The threat of a distress for rent is not * * * duress, because the party may replevy the goods distrained, and try the question of liability at law: * * *: The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable.' Christ Church Hospital v. Philadelphia County, 24 Pa. 229, 231. 'One who is improperly sued for the wrong of another, must secure himself by a defence against that action, and not by subrogation to another.' Borough of West Chester v. Apple, 35 Pa. 284, 285, 78 Am. Dec. 336. 'They [the payments] were not made under any duress of person or goods, or under any impending danger of seizure or sale of property. No warrant or other process had been issued directing a levy upon any property, nor had any right been acquired to issue such process. Before such a right could possibly be obtained the plaintiffs were entitled to a day in court, to be heard in opposition to the claim, to have the adjudication of the regularly constituted courts of the commonwealth, including the court of last resort on writ of error. * * * A payment in such circumstances is a voluntary payment.' Peebles v. City of Pittsburgh, 101 Pa. 304, 308, 47 Am.Rep. 714. 'The coercion which results from a prosecution in court, in good faith, with full right of appeal, does not constitute legal duress.' Blumenthal v. United States, D.C., 4 F.2d 808, 809.: To the same effect: Dittman v. Raule, 134 Pa. 480, 19 A. 676; De la Cuesta v. Insurance Company of North America, 136 Pa. 62, 80, 658, 663, 664, 20 A. 505, 9 L.R.A. 631; Shenango Furnace Co. v. Fairfield Township, 220 Pa. 357, 360, 370, 78 A. 237.

[8 10] Confronted by the weakness of its case, thus indicated, plaintiff seeks refuge in an alternative

theory upon which to base its cause of action, namely, that where a person is secondary liable for damages to an injured party he may recover indemnity from one primarily responsible, and in such a case it is not a prerequisite that he should have defended an action against him to the very end. On the contrary, he may pay or settle the claim voluntarily and recover against the person from whom he is entitled to indemnity, provided he has given proper notice and can establish that the settlement was fair and reasonable. Wise Shoes, Inc. v. Blair, 107 Pa.Super. 473, 479, 164 A. 89. To recover indemnity where there has been such a voluntary payment, however, it must appear that the party paying was himself legally liable and could have been compelled to satisfy the claim. Plaintiff, in order to take advantage of this principle, now contends that it was acting as the servant or agent of the owners and operators of the 'Tercero' and under their orders, that it was liable for the injuries to Barnes, and that, therefore, it is entitled to reimbursement from defendants as its principal in accordance with the rule that where a servant is responsible in damages for injuries to a third person caused, not by the negligent manner of performing an act, but as the result of the act itself as directed by the master, recovery over from the master may be had. Assuming, without deciding, that plaintiff was the servant of defendants, or that even if it was acting in the capacity of an independent contractor the same rule would apply, it is sufficient to point out that the pleadings and all proceedings in the case on the part of plaintiff were diametrically opposed to the contention which it now attempts to assert. In its defense to the Barnes suit, in its statement of claim and in the testimony which it presented in the present action, it alleged and sought vigorously to establish that it was not liable to Barnes, but that it was the crew of

the 'Tercero' who alone caused the accident by their negligence. It presented a point for charge that 'there is no evidence in the case of any negligence on the part of the Tugboat Indian Company.' The learned trial judge instructed the jury that there could be a verdict for plaintiff only if the 'Indian' was blameless in the matter, and the verdict of the jury therefore established that plaintiff was not culpable. It cannot now reverse its position by asserting that it was liable to Barnes, and recover over from defendants by obtaining a reinstatement of the verdict which, the way the case was tried, established exactly the contrary.

Judgment affirmed."

In *City of Waukesha* v. *Southwark*, 54 Minn. 79, 55 N. W. 818, it was said (54 Minn. 87):

"In order to entitle plaintiff to recourse on the defendant for the money which it had paid in settlement of the claim of Schinzel for injuries by reason of the defective sidewalk, it was necessary to establish *First*, that the city was liable to Schinzel by reason of negligence in the performance of its duty to the public to keep its streets in safe condition, and *Second*, that defendant was also liable to Schinzel by reason of his negligence in constructing or maintaining the nuisance in the street which caused the injury."

In *Carpenter Paper Co.* v. *Kelloa*, 114 CA 2d 640, 251 P. 2d 40, the Court stated (114 CA 2d 651):

"The legal principle by which the liability of the appellant to respondent upon this theory is to be tested is, we apprehend, the same as that applicable in the case of an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in-

discharge of a claim indemnified against (42 C.J.S. p. 594 § 20). While such an indemnitee is not bound to submit to suit, he is under the necessity, as a condition of recovery from his indemnitor, of proving that he was liable for the amount thus paid. (13 Cal. Jur. P. 993, § 13, 42 C.J.S. p. 603, § 25; p. 625 § 35.)"

In *Nelson* v. *Spongberg* (Wash.), 318 P. 2d 951, it was said at page 954:

"The trial court recognized the insufficiency of the evidence to establish proximate cause, but concluded that it was not necessary for the plaintiff to establish the fact that the injuries were caused by the negligence of the defendant, since a good faith settlement had been made. The respondent, in support of this conclusion, cites two cases: Lutton Mining Co. v. Louisville & Nashville R. Co., 276 Ky. 321, 123 S.W. 2d 1055, and Chicago, R. I. & P. R. Co. v. Dobry Flour Mills, Inc., 10 Cir., 211 F.2d 785. The court in the first case held that where the indemnitor denied liability under its contract, the indemnitee was justified in making a settlement, and the only question was whether it had acted in good faith. In determining whether the indemnitee had acted in good faith, however, the court undertook a lengthy discussion of the probable liability of both the indemnitee and the indemnitor and concluded that the possibility of a verdict in favor of the indemnitee was very slight and that, in making the payment, the indemnitee was not a volunteer.

In the second case cited, the court recognized the general rule that a mere volunteer in the payment of such a claim cannot successfully maintain an action against another, claimed by such volunteer to be the one liable for the payment, and cited, among other cases, Oregon-Washington R. & Nav. Co. v. Washing-

ton Tire & Rubber Co., 126 Wash. 565, 219 P. 9 as authority for that rule. The court held, however, that under the Oklahoma statute, 15 Okl. St. Ann. § 427, it was not necessary to prove liability where a settlement was made in good faith after notice to the indemnitor.

[7, 8] As recognized in that case, Washington is with the majority of courts which hold that an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in discharge of a claim indemnified against is not bound to submit to suit before paying the claim; but if he pays without such suit, as a condition of recovery from his indemnitor, he is under the necessity of proving that he was liable for the amount thus paid. Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co., supra; Carpenter Paper Co. v. Kellogg, 114 Cal. App. 2d 640, 251 P. 2d 40; Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214, 67 N. E. 439; Tugboat Indian Co. v. A/S Ivarians Rederi, 334 Pa. 15, 5 A. 2d 153; 42 C.J.S. Indemnity, § 25, p. 603. Furthermore, even though the liability of the indemnitee has been determined in a suit against him by the claimant, unless the responsibility of the indemnitor was at issue in that suit and the indemnitor was given notice, it is still incumbent upon the indemnitee, in a suit against the indemnitor, to show that his acts were the cause of the damage. Seattle v. John C. Regan & Co., 52 Wash. 262, 100 P. 731."

In *Aetna Freight Lines, Inc.* v. *R. C. Tway Company, Inc.*, Ky., 352 S. W. 2d 372, the Court said at pages 373-374:

"The appellants' contention appears to be that it was sufficient for them to show that there was a reasonable possibility that they would have been held legally liable in the actions against them in Ohio; that the Ohio res ipsa loquitur rule would have permitted

the cases to go to the jury, and therefore they might have been subjected to liability. We think, however, that it was not sufficient for them to show merely a reasonable possibility of their having been held liable, but that they were required to show actual legal liability.

As stated in the opinion on the first appeal of this case, the substantive issues in the case are controlled by the Ohio law. The Ohio rule with respect to recovery of indemnity by a person who has *settled* the claim against him is stated in Globe Indemnity Co. v. Schmidt, 142 Ohio St. 595, 53 N.E.2d 790. One of the stated requirements is that the person seeking indemnity prove 'that he was legally liable to respond' in damages to the person with whom he settled. In support of this rule the Ohio court cites Tugboat Indian Co. v. A/S Ivarans Rederi, 334 Pa. 15, 5 A.2d 153. In that case the plaintiff had settled a tort claim for personal injuries against him, arising out of his operation of a tugboat which was engaged in docking the defendant's steamship, and he sought to recover from the defendant, by way of indemnity, the amount he had paid in the settlement. In the trial of the indemnity suit the plaintiff proved that he had not been negligent in the operation of his tugboat. The court held that in order to obtain indemnity the plaintiff must have proved that he was legally liable to the person with whom he had settled, and since his proof was that he was not liable he could not recover.

Another Ohio case involving the question of proving the legal liability of the person seeking indemnity to the person with whom he settled is American Fidelity & Casualty Co. v. Bennett, Ohio App., 125 N.E.2d 754. There a truck owned by the plaintiff had been involved in a collision which caused injuries to occupants of an automobile. The occupants had brought suit against the truck owner alleging that the

truck had been negligently operated and that it had defective brakes. The truck owner had settled that suit and was seeking indemnity from the defendant, a garageman who had been employed before the accident to repair the brakes on the truck. The ground on which indemnity was sought was that the accident had been caused solely by the defective brakes, for which the garageman was primarily responsible. In upholding the recovery of indemnity the court held that a basis of legal liability of the truck owner to the injured persons had been shown, in that the truck owner was responsible in law to the injured persons for the negligence of the repairman he had employed to fix the brakes. The court said that the fact that the jury in the original damage suit possibly might have found that the accident was caused by negligent operation of the truck rather than by the defective brakes was immaterial, because it was shown on the trial of the indemnity suit that the cause of the accident was in fact the defective condition of the brakes, and under the established law the truck owner was liable to the injured persons for an accident resulting from that cause. The Bennett case does not depart from the rule stated in the Globe Indemnity case, that the person seeking indemnity must prove that he was legally liable to the person with whom he settled.

[2] In the instant case the plaintiffs-appellants alleged and submitted proof that they were not guilty of any negligence in regard to the defective condition of the drawbar. They did not allege that Ohio law imposed upon them an absolute liability regardless of lack of negligence. They based their right of recovery solely on the proposition that even though they were prepared to introduce proof in the damage suit in Ohio showing clearly that they were not negligent, the jury might have found them liable under the *res ipsa loquitur* doctrine. This shows only a *possibility* of

their having been held liable. Under the Ohio law of indemnity that is not enough—they were required to show actual legal liability.

It is our opinion that the trial court correctly gave summary judgment for the defendant because the plaintiffs did not meet the requirement laid down in the opinion on the first appeal of this case that they show a basis for legal liability on their part to the injured claimants with whom they settled."

In *Globe Indemnity Co. v. Schmitt*, 142 Ohio St. 595, 53 N. E. 2d 790, it was said at 53 N. E. 2d [illegible]:

"[6, 7] As a concluding observation it may be appropriate to remark that the right to indemnity against an actual wrongdoer exists whether the one proceeded against in the first instance settled the loss voluntarily or has a judgment recovered against him. In other words, the fact of voluntary payment does not negative the right to indemnity. However, the one seeking indemnity, after making voluntary settlement, must prove that he had given proper and timely notice to the one from whom it is sought, that he was legally liable to respond and that the settlement effected was fair and reasonable. Tugboat Indian Co. v. A/S Svavarans Rederi, 334 Pa. 15, 5 A. 2d 153."

In accord are:

Missouri P. R. Co. v. Soñken-Galemba Corp., 220 Mo. App. 462, 274 S. W. 930;

[illegible] v. *Pennsylvania Railroad Co.* (Mo.), 348 S. W. 2d 613.

If argument is advanced under *Chicago, Rock Island*, *supra*, that settlements are so favored that third parties' rights must be diluted or destroyed to accommodate to them, an opinion by the Appellate Division (1st Dept.)

which has administrative as well as appellate responsibility over all lower courts in calendar congested New York and Bronx counties lays this argument to rest. It said in *Wolff v. Laverne, Inc.*, 47 A D 2d 213, 233 N.Y.S. 2d 553, at 47 A D 2d 214-215:

> "In addition to its other objectives, pretrial affords —by informal discussion with the attorneys and the court—an opportunity for the exploration and consideration of the possibility of settlement. In fact, it is the duty of the Justice to encourage talk of settlement at such pretrial conferences and he can be of immeasurable help in acting as a catalyst in bringing the parties together to a fair settlement. Discussions of settlement can be facilitated through proper exertion of such influence that may naturally flow by virtue of his office. But this does not mean that in intervening to promote a fair settlement, undue pressure or coercive measures should be applied by the Justice on either attorney.
>
> The function of courts is to provide litigants with an opportunity to air their differences at an impartial trial according to law. While the existence of congested calendars calls for attempts to expedite the termination of suits in a minimum of time, these efforts must be consistent with the dictates of due process. Furthermore, they should not serve as a lever to exert undue pressure on litigants to oblige them to settle their controversies without their day in court. The objective should be a settlement voluntarily reached by mutual consent and not one forced on a party to his or his attorney's detriment.
>
> Assuming the power to direct a preference (see *Plachte v. Bancroft Inc.*, 3 A D 2d 437), the circumstances under which it was used in the instant case did not warrant its exercise. To penalize the defendant for not succumbing to the pressure of the Justice presiding at the pretrial to settle the case by offering

an additional $1,000, by ordering a preference of the trial of this action constituted a gross abuse of discretion.

What has been said above regarding the proper scope of a Judge's participation in settlement discussions at pretrial applies equally at other stages of an action where permissible efforts at settlement have proved unsuccessful and the parties insist upon their right to a trial. We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law. Whether such sanctions assume the form of the direction of unwarranted preferences, of compelling attorneys and litigants unnecessarily to wait in the courtroom while their cases take a desultory course on the calendar, or the exhibition of evident signs of displeasure by the Judge during or after the trial of the case, when reached, or whether such sanctions take any other devious or subtle forms, they merit and will meet with disapproval by this court."

Being repugnant to the due process Fifth and jury trial Seventh Constitution Amendments, to the express provisions of Rule 14(a) F. R. C. P. which protects these rights, and to the authorities which have concerned themselves with the rule of law to be applied, the rule of law enunciated below is manifestly wrong and must be aborted now lest what it condones becomes standard operating procedure.

POINT II

On the second phase of the case, the breach of warranty question, plaintiff's sole negligence in causing his own injury cannot serve as a basis for charging D & K with an indemnity liability on a *respondeat superior* theory because negligence of this type, even if called a breach of D & K's warranty, leads to Inger's non-liability to plaintiff rather than to Inger being held liable.

The principles which here demonstrate that plaintiff's negligence cannot serve as basis for charging D & K with a breach of warranty indemnity liability also in many ways relate back to the previous point and show, by approach from another direction, that the rule of law enunciated below on the initial liability question is in conflict with this Court's prior opinions defining the nature of the employee-shipowner-employer controversy and the principles governing indemnity claims.

The theory of a shipowner's indemnity claim is that a breach of an employer's warranty of workmanlike services created a condition which rendered the vessel unseaworthy or the shipowner negligent or brought into play a condition for which the shipowner was liable for negligence or unseaworthiness (*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U. S. 124; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U. S. 563; *Crumady v. The J. H. Fisser*, 358 U. S. 423; *Waterman S.S. Corp. v. Dugan & McNamara*, 364 U. S. 421; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355).

An indemnity right does not rest merely upon the premise that the employer is in some way chargeable with negli-

gence and that such negligence becomes a breach of warranty. Rather, the essence of such claim is that the shipowner is entitled to indemnity because the employer's sub-standard performance was that which led to the shipowner's liability to the injured plaintiff* or made the shipowner liable to him,** or caused the shipowner to be held liable to him*** and resulted in the shipowner being cast in damages to the injured.****

Thus, a claim over under Rule 14(a) F. R. C. P. is in the hypothetical: it presupposes, on an "if" basis, a shipowner being held liable to plaintiff, and its being cast in damages as a foreseeable consequence of the breach of warranty being charged to the employer.

Here, the sole cause of the accident was plaintiff's operational negligence. Even if, for argument's sake, it were assumed that an employer's warranty to a shipowner is enlarged to include a promise that one of his employees will

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* *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, *ibid.*, at page 567.

** *Waterman S.S. Corp. v. Dugan & McNamara*, *ibid.*, at pages 424-425.

*** *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, *ibid.*, at page 359.

**** *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, *ibid.*, at page 129 note 3; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, *ibid.*, at page 565; *Waterman S.S. Corp. v. Dugan & McNamara*, *ibid.*, at page 423.

not injure himself by careless use of proper equipment, an injury so caused does not give rise to an indemnity right against the employer, for it could not lead to shipowner liability.

Plainly, a shipowner is not liable to a longshoreman who is injured solely by his own (or even his fellow employees') operational negligence,** and even if it were the longshoreman being 100% negligent, damages would be mitigated to nothing.*** Consequently even if plaintiff's negligence were chargeable to D & K and convertible into a D & K breach of warranty since it could not lead to Inger's liability, (indeed, it did not lead to Inger's liability here),**** and could not serve to cast Inger in damages. It could not therefore in law be a basis for imposing an indemnity liability upon D & K (*Wicker* v. *Hoppock*, 6 Wall. 94, 99, 18 L. Ed. 752, 753).

By settling with plaintiff Inger should not be able to change the law into pseudo-law, as it should not have been enabled to change the facts into pseudo-facts, so as to do away with the requirement that that which is charged against D & K as a breach of warranty be something which would lead to an Inger liability, rather than leading in the opposite direction to Inger's non-liability.

Therefore, the breach that the opinion below charges to D & K under a *respondeat superior* theory being one which does not lead to Inger's liability to plaintiff and does not lead to Inger's being mulct in damages as a consequence,

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* This case does not deal with a situation where an injured workman creates an unseaworthy condition and is subsequently injured thereby (*Grillea* v. *United States*, 232 F. 2d 919; cf. *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 68).

** See cases cited on page 10 *supra*.

*** *Donovan* v. *Esso Shipping Co.*, *supra*.

**** See jury verdict and Judge Abruzzo's findings.

but, in fact, conversely lead to Inger's absolute non-liability to plaintiff, it cannot serve as a basis for charging D & K with a breach of contract liability to Inger.

It is thus apparent that on the second phase of the case the Court below erroneously failed to follow this Court's prior precedents defining the nature of an indemnity claim.

Furthermore, Inger cannot have a greater right to recover over on the "potential liability" theory than it could have had if it were actually liable to plaintiff. If D & K is to be bound by pseudo-facts and unfounded suppositions, so must Inger. (*Crawford* v. *Pope & Talbot, Inc., supra.*)

Even in those cases where a shipowner is in fact negligent or its vessel unseaworthy and an injured workman's negligence concurs therewith in causing his injury, recovery over against the employer by way of indemnity or contribution upon the basis of imputing workman's negligence to the employer and converting it into the employer's breach of warranty is not proper. Simple logic so dictates. Since the shipowner in such a situation recovers indemnity or contribution in full from the injured workman by way of mitigating his damage award against it, even before the threshold of the claim over is reached, the shipowner has been reimbursed in full for all damages related to this type of breach. Allowing a shipowner indemnity or contribution in addition is absurd for several reasons. First, it actually gives the shipowner indemnity or contribution for purely its own derelictions and not for anything attributable to the newly created employer-employee entity. Second, it allows the shipowner a double recovery, once from the employee and once from the employer, for a single wrong. And third, it would probably subject the injured employee to an indemnity claim by the employer so that the parties would go around and around in senseless circles. (Cf. *Cavalieri* v. *Isthmian Lines, Inc.*, 189 F. Supp. 525, 190 F. Supp. 801.)

If examples are considered, the nonsense of such theory becomes apparent. If an employee is 90% negligent and a shipowner 10% negligent, the employer recovers 10% of his total damages from the shipowner. Reversing the negligence percentages gives the employee 90% recovery. If, in addition, the employer becomes liable to the shipowner for indemnity or contribution because of the employee's negligence, the greater the percentage of employee's negligence, the less the employer has to reimburse the shipowner for, and the less the employee is negligent, the more the shipowner is reimbursed for. Thus in reality an employer would not be held liable for the employee's imputed negligence, it would be held liable solely for the shipowner's imputed negligence. Obviously, this does not make good common sense. It therefore cannot make good common law or maritime law.*

Finally, if here Inger had been found actually liable to plaintiff, it would be because it was negligent in knowingly supplying a defective beamjack after actually inspecting it to correct defects in it or to take it out of service, and it would consequently be guilty of breaching a warranty owing to D & K to supply safe and proper equipment.**

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* Parenthetically it may be noted that in the many instances when the employee's net pocket recovery (after fees, expenses, liens etc. are deducted) amounts to less than he would receive in compensation and medical benefits, the employer is liable for the difference (Section 33 Longshoremen's Act, 33 U.S.C. § 933).

** See *Mowbray* v. *Merryweather* [1895], 2 Q.B. 640; *The No. 51*, 25 F. 2d 602; *Boston Woven Hose, &c. Co.* v. *Kendall*, 178 Mass. 232; Restatement of Contracts, § 334, Ill. 5; *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310; *Cf. Italia Società Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481, cert. granted U.S. . Here it may not be said as it was in *Dragich* v. *U.S. Inger*, 305 F. 2d 139, 143, certs. den. 371 U.S. 925, that Inger was not a professional supplier of beam jacks, for Inger's own personnel unequivocally acknowledged in their testimony that Inger was not only a professional supplier, it was a professional inspector and repairer also.

Even if the theory advocated by Inger below that plaintiff's negligence in knowingly using it in that condition rendered D & K, his employer, negligent also, Inger at best would be entitled to contribution rather than indemnity. This is said for it appears that this Court realizing the harshness of rules which would either deny the shipowner any recovery over, or make full recovery over plus defense expenses absolute when both are to blame, is seeking a middle ground by allowing contribution (See, *Treadwell Constr. Co.* v. *United States*, —— U. S. ——, revg. 299 F. 2d 789 and *Weyerhaeuser S.S. Co.* v. *United States*, 372 U. S. 597, apparently forecasting the overruling of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282).

Therefore, since the most Inger could have recovered over if it were held actually liable to plaintiff would be contribution, without defense expenses, it could not in any event be entitled to more on its "potentiality of liability" theory, and, since the recovery-over claim premises itself on plaintiff's negligence, Inger would not have been entitled to any recovery over if actually liable to plaintiff because the mitigation of plaintiff's damages would already have been D & K's contribution. Inger can have no greater right under the potential liability theory.

In the final analysis, the conceptual flaws in the Court of Appeals' opinion which lead to its awarding recovery over for indemnity and defense expenses as a matter of law demonstrate the need for review here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

May 15, 1963.

Respectfully submitted,

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